Modesti Brothers, Inc. *and* Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 29-CA-8186

April 10, 1981

DECISION AND ORDER

Upon a charge filed on July 31, 1980, by Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Modesti Brothers, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, issued a complaint on August 28, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on or about July 2, 1980, following aBoard election in Case 29-RC-4711, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about July 23, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Subsequently, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint; submitting an affirmative defense; and requesting that the complaint be dismissed in its entirety.

On October 27, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment with exhibits attached. Subsequently, on October 31, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed an "Affidavit In Opposition To Motion for Summary Judgment" with exhibits attached.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent asserts as an affirmative defense that the Union's certification was illegal and improper because of the Board's failure to hold a hearing with respect to material issues of fact in dispute and accordingly Respondent does not possess any duty to bargain. Nonetheless, Respondent admits all of the operative factual allegations of the complaint except for its denial that the Union was properly certified and that the Union is the exclusive bargaining representative of employees in the unit described below.[2] Apparently, based on its denials, Respondent also denies the conclusionary averments of the complaint that it has violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. In its Affidavit in Opposition to Motion For Summary Judgment, Respondent attacks the Union's certification on the basis that "substantial and material factual and legal issues" exist which necessitate a hearing pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, and make summary judgment inappropriate and improper. In support of this contention, Respondent's affidavit repeats evidence it previously submitted to the Regional Director and to the Board in the representation proceeding. It also refers to allegedly new evidence that it would attempt to adduce at a hearing as well as certain "evidence" it presently offers in its affidavit. Based on these contentions and evidence, Respondent's affidavit denies allegations in the General Counsel's Motion for Summary Judgment that Respondent (1) does not offer to adduce at a hearing any newly discovered or previously unavailable evidence nor does it allege that any circumstances exits which would require the Board to reexamine its decisions on the representation proceeding, (2) has not raised an issue which is properly litigated in an unfair labor practice proceeding, and (3) merely seeks to relitigate issues in the representation case already decided by the Board.

[1] Official notice is taken of the record in the representation proceeding, Case 29-RC-4711, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] In its answer, Respondent specifically denies the allegations in par. 8, 11, and 12 of the complaint. Respondent does not specifically deny any other allegations of the complaint or indicate a lack of knowledge as to any of the complaint allegations. Accordingly, the remaining paragraphs of the complaint are deemed to be admitted since Sec. 102.20 of the Board's Rules and Regulations, Series 8, as amended, indicates, *inter alia*, that, "[A]ll allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the Respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown."

Review of the record herein, including the record in Case 29-RC-4711, reveals that, pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on November 5, 1979, which resulted in a vote of 5 for, 3 against, the Union, with 2 challenged ballots, sufficient in number to affect the results of the election. Thereafter, Respondent filed two timely objections to conduct affecting the results of the election, alleging in substance that the Board agent conducting the election failed to inform Respondent's observer of the proper procedure for challenging a ballot and, accordingly, an employee that Respondent intended to challenge voted in the election; and that the Union improperly induced Respondent's employees to vote for the Union by wining and dining employees on several occasions and promising employees benefits if they voted for the Union.

Following an investigation, on February 7, 1980, the Regional Director issued a Report on Challenged Ballots and Objections in which he recommended to the Board that Respondent's two objections be overruled; that the challenge to the ballot cast by Edward Modesti, Jr. (the son of Respondent's president) be sustained since Modesti, Jr., was not an employee under Section 2(3) of the Act, and did not share a community of interest with unit employees; that a revised tally of ballots be issued; and that the Union be certified as the exclusive representative of the employees.[3]

Respondent filed with the Board exceptions to all the Regional Director's recommendations, asking that the election be set aside and that a new election be conducted. Respondent also filed with the Board a request that a hearing be held on all issues in its exceptions. On July 2, 1980, the Board issued a Decision and Certification of Representative (not published in bound volumes of Board Decisions) in which it adopted the Regional Director's findings and recommendations, rejected Respondent's request for a hearing, and certified the Union as the exclusive collective-bargaining representative of the employees in the unit described below.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

Contrary to Respondent's contentions, all issues raised by it in in this proceeding were or could have been litigated in the prior representation proceeding, and Respondnet does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

In this proceeding, Respondent contends that summary judgment may not be entered because there are substantial and material issues remaining and therefore a hearing is required according to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, to consider the challenges and its objections to the election.[5] During the course of the representation proceeding, all parties were afforded the opportunity to be heard. Prior to adopting the findings and recommendations of the Regional Director, the Board considered the Regional Director's Report on Challenged Ballots and Objections, Respondent's exceptions thereto, and Respondent's initial request for a hearing. In adopting the recommendations of the Regional Director, the Board necessarily found that Respondent's objections had not raised substantial or material issues warranting a hearing. Respondent now raises the same matters raised in the representation proceeding in an attempt to obtain a hearing, but it is well settled that Section 102.69 does not give a party an absolute right to a hearing on objections to an election. It is only when the moving party presents a *prima facie* showing of substantial and material issues which would warrant setting aside the election that it is entitled to an evidentiary hearing.[6] Respondent's objections did not raise substantial or material issues in the underlying representation proceeding and they do not now raise substantial or material issues merely by being raised in the unfair labor practice proceeding. The same is true with regard to its complaint that the

[3] Inasmuch as the Regional Director recommended sustaining the challenge to the ballot of Edward Modesti, Jr., he found it unnecessary to rule on the remaining challenged ballot as it would not be determinative of the election.

[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[5] Sec. 102.69 of the Board's Rules and Regulations states, *inter alia*, that:

> (d) The action of the regional director in issuing a report on objections or challenged ballots, or both . . . may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer.

[6] Contrary to Respondent's affidavit, the Board has found in a number of cases that a respondent is under a duty to bargain with a union where no hearing was held on the objections in the underlying representation proceeding. See, e.g., *Perko's Enterprises, Inc.*, 251 NLRB 522 (1980); *Madisonville Concrete Co., a Division of Corum & Edwards, Inc.*, 220 NLRB 668 (1975); *Evansville Auto Parts, Inc.*, 217 NLRB 660 (1975).

Regional Director incorrectly sustained the challenge to the ballot of Edward Modesti, Jr. In its affidavit in opposition to the Motion for Summary Judgment, Respondent contends, however, that it has additional evidence on each issue it has raised warranting a hearing. These contentions are without merit. With respect to the status of Modesti, Jr., Respondent refers to additional evidence in Case 29-CA-7571 where Modesti, Jr., is alleged to be a supervisor under the Act. Respondent contends that at a hearing it would show he is not a superivsor. However, Modesti, Jr., was not excluded from the unit in the underlying representation proceeding because he was a supervisor but rather because he was not a Section 2(3) employee who did not share a community of interest with unit employees. Hence, Respondent's attempt to show Modesti, Jr., is not a supervisor is irrelevant to the issues framed here. And with regard to its two objections, Respondent does not offer any new evidence but simply asserts what it would prove if allowed to subpena witnesses and records. Such assertions do not raise issues warranting a hearing. Lastly, Respondent makes an offer of proof regarding the second voter, whose status the Regional Director found it unnecessary to resolve in this proceeding. The Board affirmed that recommendaton and so Respondent's proffer on his status is also irrelevant to the issues framed here. In sum, Respondent's claim that it is entitled to a hearing and that summary judgment is improper is without merit. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a New York corporation with an office in Long Island City, New York, is engaged in performing general freight trucking and related services. During the past 12 months, a representative period of all times material herein, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $50,000. During the past 12 months, a representative period of all times material herein, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $50,000 from the transportation of freight from States outside the State of New York directly to points inside the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees, including truck drivers, employed by the Employer, but excluding all office clerical employees, guards and supervisors, as defined in the Act.

2. The certification

On or about November 5, 1979, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 29, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on or about July 2, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 7, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about July 23, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since July 23, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor prac-

tices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Modesti Brothers, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees, including truck drivers, employed by the Employer, but excluding all office clerical employees, guards and supervisors, as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since or or about July 2, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 23, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Modesti Brothers, Inc., Long Island City, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees, including truck drivers, employed by the Employer, but excluding all office clerical employees, guards and supervisors, as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if

an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its office located in Long Island City, New York, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the Naitonal Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All employees, including truck drivers, employed by the Employer, but excluding all office clerical employees, guards and supervisors, as defined in the Act.

MODESTI BROTHERS, INC.